Supreme Court, U.S.
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No. 95-1456

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SPARKY'S WATERFRONT SALOON, INC.,

Petitioners,

v.

COSMOPOLITAN, INC., H.E. LOCKHART MANAGEMENT, INC., as Successor in interest by merger of LOCKHART DEVELOPMENT CORP.; ARTHUR WITTY, Individually; ARTHUR WITTY REAL ESTATE; ST. THOMAS HISTORICAL TRUST; DEJONGH ASSOCIATES; ROBERT C. DEJONGH; ARMOUR ENTERPRISES, INC; TOPA EQUITIES (VI) LTD.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS, DEJONGH ASSOCIATES & ROBERT C. DEJONGH'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a district court is required to overturn a jury verdict where although the court found a juror to have held certain views regarding "powers", and was untruthful about his educational background, the court was nonetheless satisfied that the juror carefully listened to the trial testimony, followed the jury instructions, found the facts in accordance with the evidence, was sane, and was otherwise competent during the relevant time period of jury service.

2. Whether a district court has a duty to order a juror to submit to a psychiatric examination against the will of the juror, where the court in its discretion assumed it had the authority but specifically declined to exercise it, where Petitioner failed to object to said ruling and failed to request such examination, and where Petitioner failed even to raise the issue in the district court.

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STATEMENT OF THE CASE

Petitioner filed suit against respondents in the District Court of the Virgin Islands as a result of a fire which occurred on September 18, 1989. Petitioner claimed that a fire in one building spread across to Petitioner's building by means of a wooden trellis connecting the two buildings. After almost three (3) weeks of trial, a verdict was rendered on June 10, 1994, finding respondents negligent, but finding also that their negligence did not proximately cause the fire damage to Petitioner's building.

Almost six (6) months after the verdict, and almost four (4) months after the denial of post-trial motions, Petitioner informed the district court about jury tampering allegations made by the jury foreman[1] to Petitioner. Through use of an FBI agent, the court investigated the matter at which time questions about the mental competency of the same juror arose. The court thereafter conducted extensive and numerous hearings with all counsel present, allowed Petitioner to submit the findings of its own psychiatrist, met with the juror and his court-appointed counsel, allowed Petitioner to submit certain written questions to the juror, required the juror to submit sworn answers thereto, retained a psychiatrist to review all available records, and allowed cross examination of the court-appointed psychiatrist. The juror declined to submit to a psychiatric examination by the court-appointed psychiatrist.

The court ultimately found no evidence of jury tampering or that the jury foreman was anything other than mentally competent to understand the trial proceedings, to deliberate dispassionately on the evidence, and to render an impartial verdict at the conclusion of the case.

Petitioner appealed all the lower court rulings to the U.S. Court of Appeals for the Third Circuit which after hearing oral

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[1] The juror in question will be referred to herein as "juror #8".

argument on December 4, 1995, issued a five (5) line Judgment Order affirming each and every contention raised by Petitioner. (Petitioner's App., 1a-2a). This unanimous Judgment Order dated December 8, 1995, has not been published nor reported. Petitioner is not challenging any rulings except those relating to the mental competency of the juror.

ARGUMENT

The Court should not accept certiorari jurisdiction because the Third Circuit Court of Appeals' five (5) line decision as well as the district court's rulings are not in conflict with the legal standards for evaluating juror competency as historically recognized by this Court. Nor is there any conflict with any other decisions of the various circuits that needs to be rectified by this Court.

Rule 15.1 of the Supreme Court Rules admonishes counsel that they have an obligation to the Court to point out any perceived misstatements of fact or law set forth in the Petition "which have a bearing on the question of what issues would properly be before the Court if certiorari were granted". Petitioner has in several instances misstated the facts in seeking to obtain a writ of certiorari.

Petitioner contends that the district court found the juror in question to suffer from a psychotic illness, to be irrational, and to have been delusional at the time of the trial yet nonetheless determined the juror competent to sit as a juror. (Petition For Writ of Certiorari at i, 7, 10). Besides finding the juror mentally competent, the court made no such findings as recited by Petitioner. In fact, the court-appointed psychiatrist, Dr. Bruce Berger made no diagnosis that the juror was either schizophrenic or suffering from a major psychotic mental

disorder (R.A4749).[2] While Petitioner includes Dr. Berger's written report in APPENDIX K, Petitioner for obvious reasons has failed to include any cross-examination by counsel and the court of Dr. Berger.

Dr. Bruce Berger was unable to form an opinion within reasonable medical certainty whether juror #8 was incompetent during his jury service. (Petitioner's App., 70a). This finding was reached notwithstanding the peculiar beliefs and powers of the juror, and the untruthful responses about his educational background. Specifically, Dr. Berger noted that juror #8 was not suffering from hallucinations, incoherence, grossly disorganized behavior or significant social/occupational dysfunction. (Petitioner's App., 67a). Moreover, he found "no indication or suggestion that [juror #8's] behavior was consideration (sic) unusual or bizarre during his jury duty". (Petitioner's App., 68a).

Petitioner further contends that the district court determined it had no power to order the juror to undergo a psychiatric examination, and thereby "cut the process short" by simply delivering written materials to Dr. Berger without compelling such an examination (Petition For Writ of Certiorari at 6, 13). The truth of the matter is to the contrary. As stated by the district court—

> "This court took that issue up with all counsel that it had grave doubts as to whether it had the power to require [juror #8] to subject himself to psychiatric examination, but that if the Court had the discretionary power it did not expect to exercise it." (Emphasis Supplied). (R.A4701).

Moreover, the district court specifically found that no counsel, (including counsel for Petitioner) objected or reserved any right

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[2] Throughout this Opposition, the notation "R.___ shall be used to denote references to the Appendix filed with the Third Circuit.

to request such an examination, either before or after Dr. Berger rendered his findings. (R.A4700-4703). The very first time Petitioner raised this issue was before the Third Circuit Court of Appeals.

Since the court believed it had the power to order such an examination, but specifically decided not to exercise it, there is no need for the U.S. Supreme Court, on Petitioner's behalf, to rule if and when a district court has the power to order a psychiatric examination.

There exists no compelling reason for certiorari to be granted on these issues. The district court carefully considered the standards of mental competency applicable to jurors in Tanner v. United States, 483 U.S. 107 (1987), United States v. Dioguardi, 492 F.2d 70 (2d Cir. 1974) and Sullivan v. Fogg, 613 F.2d 465 (2d Cir. 1980), and determined carefully that the proper standard was whether the juror was mentally competent at the time of jury service. (Petitioner's App., 7a). Likewise, the district court held that the burden of proof of establishing incompetence is with the plaintiff to prove either by a preponderance of the evidence or by clear and convincing evidence.

The court grappled with the definition of what is juror competency. (Petitioner's App., 42a, 52a). In considering that issue, the district court looked for guidance to United States v. Hall, 989 F.2d 711, 714 (4th Cir. 1993) for the holding that a jury's verdict must be set aside "if the defendant presents clear evidence of a juror's incompetence to understand the issues and to deliberate at the time of his service." (Petitioner's App., 40a). See, also Dioguardi, supra at 78.

Petitioner finds fault with the test for juror competency utilized by the district court because "it never set forth with any precision the criteria that should be used to determine whether a juror was mentally competent to sit at trial", i.e. whether the juror was able "to arrive at a rational conclusion", citing Jordan

v. Massachusetts, 225 U.S. 167, 173 (1912). (Petition for Writ of Certiorari at 9, 10). This is a frivolous argument for several reasons.

First of all, the district court exhaustively reviewed the relevant case law, and applied that law to the facts sub judice. In none of those cases is there cited any specific "criteria to be used", in determining whether a juror was mentally competent, or able to arrive at a rational conclusion. None of those cases has been overturned because of any lack of specific criteria used. Nor has Petitioner ever suggested what the criteria ought to be.

It seems axiomatic that each case must be evaluated on its own facts, and that there cannot be a litmus test of competency applicable to all cases. However, Petitioner conveniently overlooks the many factors considered by the district court in finding, using its own criteria, that juror #8 was mentally competent notwithstanding his peculiar beliefs and powers. These factors were clearly and amply set out by the district court throughout the extensive hearings held on this matter.

As stated by the district court, it watched the juror "carefully" throughout several weeks of trial and on two occasions in chambers during the competency proceedings. (Petitioner's App., 12a, 43a). It observed the juror pose intelligent questions about two counsel who were brothers in the same case and observed the juror's reaction, observed the juror stand up as jury foreperson and render the verdict, and in each situation, juror #8 "seemed to be under complete control". (Petitioner's App., 4a, 12a). The fact that the juror was chosen as the jury foreperson, ran for elected office, and seemed to be a very intelligent person also convinced the court that the juror was mentally competent at all relevant times. (Petitioner's App., 30a, 31a)

The district court further determined that there was no evidence that during his jury service, any of the juror's peculiar

beliefs and powers in any way were expressed by him or alluded to in any way, (Petitioner's App., 29a), or that the juror's problems affected his jury service or in any way dominated or influenced him in the jury room or courtroom. (Petitioner's App., 14a, 41a). In its view, the juror determined the facts of the case after carefully listening to and following the court's jury instructions, and applying the law to the facts. (Petitioner's App., 14a). Moreover the court saw no problems with the juror during jury service, nor did it hear of any problems about juror #8 raised by anyone associated with the case including court-personnel or other jurors. (Petitioner's App., 30a).

The district court found juror #8 to be mentally competent "by a wide margin". (Petitioner's App., 15a). Finding not only that the juror could operate normally in life, could handle his own bank account, and could assume other duties in life, the court stated that it would be "frivolous" for anyone to argue that the juror should be institutionalized, adjudged incompetent or denied the right to vote (Petitioner's App., 12a, 13a, 30a). The court therefore had no difficulty in finding that the juror was not a man who was insane either closely before, during or closely after service as a juror. (Petitioner's App., 12a).

Based on the foregoing, it is indeed difficult to comprehend how Petitioner can seriously argue that the district court "overlooked" the question whether juror #8 was able to arrive at a rational conclusion, or whether juror #8 could understand the issues or could deliberate at the time of service. The court fully analyzed the standards enunciated in the applicable case law, and followed the correct standard all the while protecting Petitioner's due process rights. It is equally incomprehensible to argue as Petitioner has, that the district court should have compelled juror #8 to undergo a psychiatric examination against his will. The district court in its discretion correctly declined to take that drastic step.

To petition this Court for a writ of certiorari to give "guidance" in an area where the district court has already and adequately set forth its own criteria for deciding whether a juror was mentally competent, and to instruct district courts that they have the power to order psychiatric examinations, where this district court has not claimed it lacks such power, invites an advisory opinion from this Court where none is required.

CONCLUSION

For the district court to ultimately hold that Petitioner failed to prove by any civil standard of proof that juror #8 was mentally incompetent, was a considered finding reached after a thorough consideration of existing case law, common sense, and the facts of this case. There is no conflict among the circuit courts or even among the district courts on the matter of the standard for juror competency necessitating any involvement by the U.S. Supreme Court. There is also no need for this Court to address when and under what circumstances a court should order a psychiatric examination against the will of a juror. For these reasons, the Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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